STATE OF MICHIGAN

COURT OF APPEALS

LEON JACKSON,

Plaintiff-Appellant/Cross Appellee,

v

RANDY LIEBERMAN, MD, MARC MEISSNER, MD, DETROIT MEDICAL CENTER and HARPER HOSPITAL,

Defendants-Appellees/Cross Appellants,

and

AFFILIATED INTERNIST CORPORATION,

Defendant.

UNPUBLISHED
July 12, 2005

No. 252748
Wayne Circuit Court
LC No. 03-325497-NH

Before: O'Connell, P.J., and Schuette and Borrello, JJ.

PER CURIAM.

Plaintiff appeals as of right from a circuit court order granting defendants' motion for summary disposition. Defendants cross appeal from that order and from a prior order granting plaintiff's motion to correct his affidavit of merit. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

I. FACTS

Plaintiff went to Harper Hospital February 13, 2001, for a radiofrequency catheter ablation, administered by the individual defendants, Lieberman and Meissner. Plaintiff claims that defendants Lieberman and Meissner were negligent during the procedure, causing third degree radiation burns that degenerated into ulcerous sores. Plaintiff also claims defendants Detroit Medical Center (DMC) and Harper Hospital breached the standard of care by failing to provide and supervise properly trained electrophysiologists and for failing to have appropriate policies to prevent excessive radiation exposure during this procedure. Plaintiff retained an attorney who sent defendant Harper Hospital notice of intent to sue on August 16, 2001. Although the notice of intent stated that it was from Charlissa Aaron, the body of the notice referred to the burns suffered by plaintiff. Subsequently, plaintiff retained another attorney who

sent the other defendants; Lieberman, Meissner, and DMC, a notice of intent to sue on February 3, 2003. Plaintiff filed this medical malpractice suit on August 4, 2003. Defendants Lieberman, Meissner and DMC filed a motion for summary disposition, claiming the limitations period expired on February 13, 2003, and that plaintiffs second notice of intent to sue did not toll the statute of limitations.

In the alternative, defendants claimed plaintiff failed to serve a properly notorized affidavit of merit with the complaint. Defendants argued that the affidavit submitted by plaintiff did not indicate it had been signed under oath before a notary. Prior to the hearing on defendants'motion for summary disposition, the trial court granted plaintiff's motion to file a corrected affidavit of merit and authorized plaintiff to have the notary affix her seal and affirmation to the affidavit of merit. In December 2004, defendants filed a claim of cross appeal from the trial court's granting of plaintiff's motion to file a corrected affidavit of merit.

In his response to defendants' motion for summary disposition, plaintiff argued the August 2001 notice of intent to Harper Hospital did not provide appropriate notice because it identified Aaron as the claimant, it did not list any defendants other than Harper Hospital, and it did not include a statement of plaintiff's damages. Therefore, the February 2003 notice of intent was the only valid notice, thus tolling the limitations period until August 4, 2003. The trial court disagreed.

Plaintiff conceded that his claim against Harper Hospital was barred by the statute of limitations. The trial court granted defendants' motion for summary disposition, ruling that because plaintiff had sent a notice of intent in August, 2001, that was the only notice that could be filed and the limitations period could not be extended by additional notices of intent sent to other parties.

II. STANDARD OF REVIEW

The trial court's ruling on a motion for summary disposition is reviewed de novo. *Kefgen v Davidson*, 241 Mich App 611, 616; 617 NW2d 351 (2000). Whether a cause of action is barred by the statute of limitations is a question of law that we also review de novo. *Ins Comm'r v Aageson Thibo Agency*, 226 Mich App 336, 340-341; 573 NW2d 637 (1997).

III. ANALYSIS

A. Statute of Limitations & Tolling: Harper Hospital

Pursuant to MCL 600.5838(a), plaintiff's cause of action accrued on February 13, 2001, the date of the procedure at Harper Hospital. Therefore, plaintiff had two years from February 13, 2001 to file his claim. MCL 600.5805(6).

Furthermore, a medical malpractice complaint cannot be filed at any time during the limitations period. Rather, a plaintiff must provide a notice of intent to sue consistent with MCL 600.2912b:

> (1) Except as otherwise provided in this section, a person shall not commence an action alleging medical malpractice against a health professional or health facility

> unless the person has given the health professional or health facility written notice under this section not less than 182 days before the action is commenced.
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> ****
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> (6) After the initial notice is given to a health professional or health facility under this section, the tacking or addition of successive 182-day periods is not allowed, irrespective of how many additional notices are subsequently filed for that claim and irrespective of the number of health professionals or health facilities notified.

Pursuant to MCL 600.2912b(1), plaintiff provided notice to the hospital on August 16, 2001. MCL 600.5856(d)[1] provides in pertinent part:

> If, during the applicable notice period under section 2912b, a claim would be barred by the statute of limitations or repose, for not longer than a number of days equal to the number of days in the applicable notice period after the date notice is given in compliance with section 2912b.

The tolling provision MCL 600.5856(d) was not triggered because the notice of intent was sent to the hospital more than 182 days before the limitations period expired. "[T]he limitation period is unaffected by the fact that, during that period, there occurs an interval when a potential plaintiff cannot file suit." *Omelenchuk v City of Warren*, 461 Mich 567, 574; 609 NW2d 177 (2000), overruled in part on other grounds by *Waltz v Wyse*, 469 Mich 642, 655; 677 NW2d 813 (2004). Therefore, the limitations period was not tolled and expired on February 13, 2003, six months before plaintiff filed this action. Plaintiff's claim against defendant Harper Hospital was properly dismissed as untimely. Also, while plaintiff disputes the trial court's ruling as to his claim against Harper Hospital, arguing that the notice as filed was legally insufficient to constitute the notice required by § 2912b, he admitted at the hearing on the motion "that against Harper Hospital only, it's beyond the statute of limitations." Having conceded the issue below, plaintiff cannot claim error on appeal. *Living Alternatives for the Developmentally Disabled, Inc v Dep't of Mental Health*, 207 Mich App 482, 484; 525 NW2d 466 (1994).

B. Statute of Limitations: Other Defendants

> The notice provided to the hospital did not identify the other defendants eventually named in the suit, and those defendants were not provided notice until February 3, 2003. Plaintiff claims he had to wait 182 days before filing suit against those defendants and, because the limitations period would have expired during that period, it was tolled by § 5856(d).

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[1] MCL 600.5856(d), which was rewritten in 2004, is now MCL 600.5856(c), which reads: At the time notice is given in compliance with the applicable notice period under section 2912b, if during that period a claim would be barred by the statute of limitations or repose; but in this case, the statute is tolled not longer than the number of days equal to the number of days remaining in the applicable notice period after the date notice is given.

However, Section 2912b(6) makes it clear that only one notice is required and only one 182-day waiting period is allowed. This subsection, by its terms "would clearly apply to an additional notice that added other "health professionals or health facilities" to a claim originally noticed against an individual "health professional or health facility." *Ashby v Byrnes*, 251 Mich App 537, 545; 651 NW2d 922 (2002). Moreover, even if the first notice is provided more than 182 days before the end of the limitations period such that the tolling provision of § 5856(d) is not triggered, a plaintiff cannot file a second notice less than 182 days before the end of the limitations period so as to take advantage of § 5856(d)'s tolling provision. *Id.* at 544-545. Therefore, the limitations period on plaintiff's claim as against the other defendants was not tolled and expired in February 2003, six months before plaintiff filed suit. The trial court did not err in granting defendants' motion as to all defendants.

We need not address the issues raised in defendants' cross appeal regarding plaintiff's motion to file a corrected affidavit of merit because we find that defendants were entitled to judgment on the ground that the action was time-barred.

Affirmed.

/s/ Peter D. O'Connell
/s/ Bill Schuette
/s/ Stephen L. Borrello